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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:	2 CA-CV 2008-0038
	DEPARTMENT A
THERESA LOUISE McKENNA,	
	MEMORANDUM DECISION
Petitioner/Appellee,	Not for Publication
	Rule 28, Rules of Civil
and	Appellate Procedure
TIMOTHY PAUL McKENNA,	
Respondent/Appellant.	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. DO200700282

Honorable Brenda E. Oldham, Judge

AFFIRMED

Timothy P. McKenna — Green Valley
In Propria Persona

P E L A N D E R, Chief Judge.

¶1 Appellant Timothy McKenna appeals from the trial court's order denying his post-dissolution petition to modify child custody and visitation. In a rather confusing argument on appeal, Timothy requests this court to "rule in the best interest of the minor

child that both parents should have equal say." To the extent Timothy thereby asserts the trial court abused its discretion, we disagree and affirm the court's order.

¶2 Timothy and Theresa McKenna's marriage was dissolved in 1997. Theresa was granted sole legal custody of their two daughters. In 2007, Timothy filed a petition to modify child custody and visitation of the younger daughter, now sixteen years old. He requested that he be "awarded joint custody and equal control of [the] minor child[]." After an evidentiary hearing at which both Timothy and Theresa testified, the trial court found the child was "doing well" in Theresa's custody and denied Timothy's petition. This appeal followed. We have jurisdiction of this appeal pursuant to A.R.S. § 12-2101(C) because the ruling from which Timothy appeals constitutes a "special order" after final judgment. *See Sheehan v. Flower*, 217 Ariz. 39, n.3, 170 P.3d 288, 289 n.3 (App. 2007).[1]

Discussion

¶3 We first note that Theresa has not filed an answering brief on appeal. We may regard that failure as a confession of reversible error as to any debatable issue but are not required to do so. *See Gonzales v. Gonzales*, 134 Ariz. 437, 437, 657 P.2d 425, 425 (App. 1982). And "we hesitate to do so where, as here, there was no error." *In re $26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 20, 18 P.3d 85, 91 (App. 2000). Accordingly, in our discretion, we proceed to the merits. *See Thompson v. Thompson*, 217 Ariz. 524, n.1, 176 P.3d 722, 724 n.1 (App. 2008).[2]

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[1]Timothy's brief does not contain a statement of the case indicating "the basis of the appellate court's jurisdiction," as required by Rule 13(a)(3), Ariz. R. Civ. App. P.

[2]Our decision to exercise our discretion to reach the merits, even in the absence of an answering brief, is supported in part by Timothy's failure to comply with the Arizona Rules

¶4 As he did below, Timothy asserts that Theresa's actions "resulted in 'bel[]ow standard medical care and medication errors'" which led to the parties' younger daughter being diagnosed with "gastroesophageal reflux." He argues the trial court ignored the evidence he presented to establish those errors. He also maintains that the child's "academic performance ha[s] decreased" and that she "has expressed the desire to have both her biological parents have equal say in her welfare and education."[3] "We will not disturb a trial court's decision on child custody absent a clear abuse of discretion." *In re Marriage of Diezsi*, 201 Ariz. 524, ¶ 3, 38 P.3d 1189, 1191 (App. 2002).

¶5 Theresa introduced a letter from the younger daughter's therapist stating that the child's "grades [we]re excellent" and that she felt "the allegations made associated with medical neglect are completely unfounded." She also introduced medical and school records that showed the treatment the child had received and that she was performing well in school. Thus, there was evidence to support the trial court's decision. *See Pridgeon v. Superior Court*, 134 Ariz. 177, 179, 655 P.2d 1, 3 (1982) (trial court will not be reversed unless "clear absence of evidence to support its actions"). Additionally, because Timothy has not provided us with the transcript of the hearing below, we must presume the missing portion of the

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of Civil Appellate Procedure in his opening brief. He did not provide citations to the record or to relevant authority in support of most of his arguments, *see* Ariz. R. Civ. App. P. 13(a)(6), and failed to comply with most other requirements for an opening brief. *See* Ariz. R. Civ. App. P. 13(a)(1)–(5).

[3]We note that "[t]he child's desires are important but not necessarily controlling" in a change of custody determination. *Bailey v. Bailey*, 3 Ariz. App. 138, 141, 412 P.2d 480, 483 (1966).

record supports the trial court's findings and conclusions. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995).

¶6 Furthermore, even if Timothy introduced evidence contrary to that which Theresa produced, his argument essentially seeks to have this court reweigh the evidence presented below. That we cannot do. "The trial court is in the best position to judge the credibility of the witnesses, the weight of evidence, and also the reasonable inferences to be drawn therefrom." *Goats v. A.J. Bayless Mkts., Inc.*, 14 Ariz. App. 166, 171, 481 P.2d 536, 541 (1971); *see also Burk v. Burk*, 68 Ariz. 305, 308, 205 P.2d 583, 584 (1949) ("[T]he trial judge is in the best position to determine what is best for the child . . . ."). Thus, we will not substitute our judgment for that of the trial court. *See Goats*, 14 Ariz. App. at 169, 481 P.2d at 539. In sum, we cannot say the court abused its discretion in denying Timothy's petition to modify child custody.

Disposition

¶7 The order of the trial court is affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge